

May 23, 2005

Christi Hogin, City Attorney
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Manhattan Towers
1230 Rosecrans Avenue, Suite 110
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Re: Your Request for Advice
Our File No. A-05-070

Dear Ms. Hogin:

This letter is in response to your request on behalf of Councilmember Pamela Conley Ulich, of the City of Malibu, for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹

QUESTIONS

1. May Councilmember Ulrich participate in the city council’s consideration of a development agreement between the city and Wave Properties, Inc., (“Wave”) a wholly-owned supporting corporation of Pepperdine University (“Pepperdine”)?
2. May Councilmember Ulrich participate in the city council’s consideration of the proposed development agreement between the city and Malibu Residential Housing Group, LP (“MRHG”), of which Wave is the general partner?

CONCLUSIONS

1. Councilmember Ulich may not participate in decisions regarding the development agreement between Wave and the City of Malibu, if it is reasonably foreseeable that such decisions would have *any* financial effect at all on Wave.
2. It is presumed that the financial effect of the governmental decision on MRHG is material. Therefore, unless this presumption is rebutted, Councilmember Ulich is

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

disqualified from participating in decisions regarding the proposed civic center property development agreement between MRHG and the city of Malibu.

FACTS

Councilmember Pamela Conley Ulich was elected to the Malibu City Council on April 6, 2004. She is also an adjunct professor at Pepperdine University School of Law, which is a component of Pepperdine University ("Pepperdine"). Councilmember Ulich receives approximately \$3,000 in compensation from Pepperdine each year. She has received approximately that amount in the last twelve months.

You stated in your letter of April 8, 2005, that Wave Property, Inc., ("Wave") is a wholly-owned supporting corporation of Pepperdine and is exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code. Wave owns property located in the City of Malibu. The first property, known as the "nursery property," is owned entirely by Wave. The second property, the "civic center property," is owned by a limited partnership, Malibu Residential Housing Group, LP ("MRHG"), of which Wave is the general partner. Wave has an approximate 60% interest in the partnership and the remaining 40% is owned by unrelated parties.

In a phone call on May 5, 2005, Gregg Kovacevich an attorney with your firm stated that Wave is under control and management of Pepperdine, which is its sole owner. He also said that MRHG, which is a for-profit limited partnership, is in turn controlled and managed by Wave. All three entities share the same address. Pepperdine and Wave share resources and have some board members in common.

The City of Malibu is contemplating a development agreement with Wave that would involve one or both of the above referenced parcels. At the moment, MRHG is offering to negotiate an arrangement whereby two acres of property is donated or sold to the City for use as part of a wastewater treatment facility in exchange for certain development rights on the remaining property owned by MRHG.

ANALYSIS

The Act's conflict of interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

A public official has a "financial interest" in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; regulation 18700(a).) The Commission has adopted a standard analysis

for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

1 & 2: Is Councilmember Ulich a “public official” and will she be making, participating in making, or influencing a governmental decision?

The conflict of interest provisions of the Act pertain only to public officials. A public official includes “every member, officer, employee or consultant of a state or local government agency . . .” (Section 82048; regulation 18701(a)(1).) As an elected member of the city council, Councilmember Ulich is a public official subject to the Act’s conflict of interest provisions.²

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See regulation 18702.1.)

Councilmember Ulich will “make a governmental decision” if she votes on any issue obligating the city with respect to a development agreement with Wave and/or MRHG including agreements regarding the “nursery property” and the “civic center property.” In addition to actually voting on these matters, if she engages in negotiations without significant substantive review, provides advice or make recommendations, she will be “participating” in a decision (regulation 18702.2). She will also be “influencing” that decision if she appears before or otherwise attempt to influence any member, officer, employee or consultant of the agency. (Regulation 18702.3.)

3. What are Councilmember Ulich’s economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); regulation 18703.1(a)); or in which

² If a public official is enumerated in section 87200 (including city council members) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5, subdivision (b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (§ 87105). Since Ms. Ulich is a council member, a position enumerated in Section 87200, these requirements apply to her.

he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); regulation 18703.1(b));

- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); regulation 18703.2);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); regulation 18703.4);

In addition, a public official always has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; regulation 18703.5).

Sources of Income:

Pepperdine University: A public official has an economic interest in any person, including an entity designated as a non-profit entity under section 501(c)(3) of the Internal Revenue Code, from whom he or she has received income which aggregates to \$500 or more within 12 months prior to the governmental decision. (Section 87103(c); regulation 18703.3.)

Your letter states that Councilmember Ulich receives approximately \$3,000 in compensation from Pepperdine each year and she has received approximately this amount within the past 12 months. Therefore, Councilmember Ulich has an economic interest in Pepperdine University as a source of income. (Section 87103(c).)

Wave Property, Inc.: For conflict of interest purposes, the Commission has “pierced” through entities, such as for-profit and non-profit corporations, on some occasions based on the nature of the relationship between the entity and those who control the entity. Under these circumstances, multiple persons/entities may be treated as sources of income. (*Atigh* Advice Letter, No. I-93-383, copy enclosed.)

In the *Atigh* Advice Letter, where a city councilmember derived income from a non-profit organization, we stated that it was appropriate to treat both the parent non-profit and its wholly-owned and controlled subsidiary (as that term might apply in the non-profit sector) as sources of income to the councilmember. Thus both were considered economic interests of hers.

Based on facts in your letter and in the phone call with Mr. Kovacevich, an attorney with your firm, Wave is a wholly-owned and controlled by Pepperdine. There is

shared management and control between the entities. There are shared offices, resources, boardmembers and employees as well as the pursuit of joint goals and common interests. In fact, Wave's mission as reflected in its IRS Form 990 application states that it is "a supporting organization of Pepperdine University and as such manages assets, earns income and pays expenses *solely for the benefit* of its parent 501(c)(3) corporation." In other words, Wave exists *solely* to benefit and serve the interests of its parent, Pepperdine. As such, Wave, in essence, functions as an alter ego for its parent non-profit, Pepperdine.

Thus, consistent with the rationale set forth in the *Atigh* Advice Letter *supra*, we would consider both of the entities as sources of income to Councilmember Ulich, and thus both would be economic interests of hers.

Malibu Residential Housing Group, LP ("MRHG"): In the case of MRHG, the situation is factually different. Wave, which has a 60 percent interest in MRHG, is the controlling general partner of MRHG.

For purposes of disqualification, the Commission has stated that a public official has an economic interest in a business entity where there is a parent-subsidiary relationship. (Section 87100; regulation 18703.1(c)) A parent-subsidiary relationship exists when "one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation." (Regulation 18703.1(d)(1).)

By analogy, we would apply the same analysis to the situation with Wave, a non-profit entity which has a 60 percent interest and is the controlling partner in MRHG, a for-profit business entity. Therefore, we conclude Councilmember Ulich also has an economic interest in MRHG as a source of income for purposes of section 87103, due to its parent-subsidiary relationship with Wave.³

Personal Finances:

A public official has an economic interest in his or her personal finances and those of his or her immediate family. (Section 87103; regulation 18703.5.) A governmental decision will have an effect on this economic interest if the decision will result in the expenses, income, assets or liabilities of the official or his or her immediate family increasing or decreasing. (*Ibid.*)

Your letter does not mention any impact on Councilmember Ulich's personal finances as the result of the proposed development agreements, therefore we do not further discuss this basis for disqualification in our analysis. But note that a conflict of interest may arise if it is reasonably foreseeable that the decision will have an effect on Councilmember Ulich's personal finances.

³ We note that the term "person" under the Act includes a group of persons acting in concert. (Section 82047.)

4. Are Councilmember Ulich's economic interests directly or indirectly involved in the governmental decision?

A person, including a source of income, is directly involved in a governmental decision if the person initiates a proceeding by filing an application, claim, appeal or similar request, or is a named party in, or is the subject of the proceeding concerning the decision before the official or the official's agency. (Regulation 18704.1(a)(1)-(a)(2).) A person is the subject of a proceeding concerning the decision before the agency if the "decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with," that person. (Regulation 18704.1(a)(2).) If a person who is an economic interest to a public official is not directly involved in a governmental decision, the person is deemed to be indirectly involved.

Nursery Property: Wave Property, Inc.: Wave, a non-profit, wholly-owned by Pepperdine, is a named party in the proposed *nursery property* development agreement between the city and Wave Property, Inc. Furthermore, the development agreement represents contractual commitments between the city and Wave Property, Inc. Thus, Wave Property, Inc. is directly involved in the governmental decisions of the city council concerning these negotiations.

Civic Center Property: MRHG Directly Involved: The second property, the "civic center property, "is owned by a limited partnership, MRHG, of which Wave is the general partner. Wave Properties, Inc. has an approximate 60% interest in the partnership and the remaining 40% is owned by unrelated parties. MRHG is a named party in the proposed *civic center* property development agreement between the city and MRHG. This development agreement represents a contractual commitment between the city and MRHG. Therefore, MRHG is directly involved in the governmental decision before the city council.

Pepperdine: Since Wave and MRHG are directly involved in the governmental decision we do not further analyze Pepperdine's involvement.

5 & 6: Applying the materiality standards and determining the foreseeability of a material financial effect.

Directly Involved Non-profit Entities: When a non-profit entity that is a source of income to a public official is directly involved in a governmental decision, should that decision have any financial effect at all – even a penny's worth – on that entity, it is deemed to be material. (Regulation 18705.3(a).) Thus, Councilmember Ulich may not participate in decisions regarding the nursery development agreement between Wave and the city of Malibu, if it is reasonably foreseeable that such decisions would have *any* financial effect at all on Wave.

Directly Involved Business Entities: If a business entity in which a public official has an economic interest is directly involved in a governmental decision, *it is presumed* that the *financial effect* of the governmental decision on the business entity *is material*. (Regulation 18705.1(b)(1).) This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect – even a penny’s worth – on the business entity.

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Therefore, unless this presumption is rebutted, Councilmember Ulich is disqualified from participating in decisions regarding the nursery development agreement and the proposed civic center property development agreement between MRHG and the city of Malibu.

7 & 8: The Public Generally and Legally Required Participation Exceptions

An official who otherwise has a conflict of interest in a decision may still participate under the “public generally” exception. This exception applies when the financial effect of a decision on a public official’s economic interests is substantially the same as the effect on a significant segment of the public. The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; regulation 18708.) Nothing in your facts indicate that either of these exceptions apply to the decisions in question.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

Enclosure
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